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July 29, 2010

BY FEDERAL EXPRESS

Hon. Lester A. Heltzer
Executive Secretary
National Labor Relations Board
1099 14th Street, NW
Washington, D.C. 20570-0001

Re: Employer's Request for Review of the Regional Director's Decision: Volunteers of America Greater New York, Inc. v. Community and Social Agency Employees' Union, District Council 1707, AFSCME, Case Nos: 2-RC-23489, 2-RC-23490 and 2-RC-23491.

Dear Mr. Heltzer:

I enclose eight (8) copies of the Employer's Request for Review of the Regional Director's Decision in the above referenced consolidated cases. For your convenience, I attach a copy of the Regional Director's Decision.

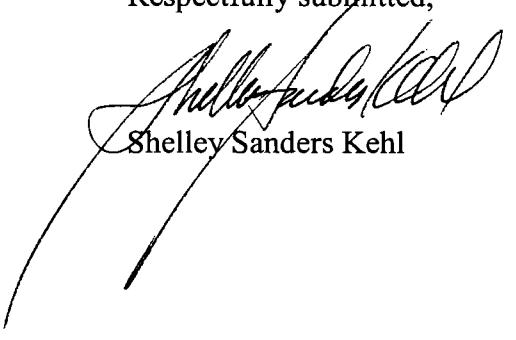
We are simultaneously serving a copy of this Request for Review on the Regional Director and on counsel for the Union.

In view of the fact that the Request for Review raises a question regarding the Board's jurisdiction, we respectfully request that the election in the three units be postponed until the matter is resolved by the Board.

If the Board needs any additional information, please do not hesitate to make the request.

Thank you for considering the appeal.

Respectfully submitted,



Shelley Sanders Kehl

cc:

Hon. Celeste J. Mattina
Regional Director, Region 2
National Labor Relations Board
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UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 2

In the Matter of	:	
VOLUNTEERS OF AMERICA GREATER NEW YORK, INC.,	:	
	:	**Case Nos. 2-RC-23489**
Employer,		**2-RC-23490**
	:	**2-RC-23491**
- and -	:	
COMMUNITY AND SOCIAL AGENCY EMPLOYEES' UNION, DISTRICT COUNCIL 1707, AFSCME, AFL-CIO,	:	
Petitioner.	:	

EMPLOYER'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S DECISION

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UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
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	:	**2-RC-23491**
- and -	:	
COMMUNITY AND SOCIAL AGENCY EMPLOYEES' UNION, DISTRICT COUNCIL 1707, AFSCME, AFL-CIO,	:	
Petitioner.	:	

EMPLOYER'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S DECISION

Preliminary Statement on Basis for Review

On July 16, 2010, the Regional Director issued a decision and a direction of election in the captioned cases, taking the position that it is appropriate for the NLRB to assert jurisdiction over the Employer, Volunteers of America Greater New York, Inc. (hereinafter "Volunteers of America"), an interdenominational church whose faith based Christian mission is manifested in helping the poor and impaired through social programs. In addition, the Regional Director determined that all but two of the (contested) Case Managers should be included in the unit sought by the Union, despite the Employer's assertion that Case Managers do not share a

community of interest with the other positions in the unit, and exercise certain supervisory responsibilities.

Volunteers of America hereby appeals the Regional Director's determination that the Board can assert jurisdiction over a recognized church in the face of the record made at the consolidated evidentiary hearing held on June 14 and 15, 2010 and the evolving case law on this sensitive constitutional issue. This appeal is based on the following grounds:

1. In asserting jurisdiction, the Regional Director has chosen to depart from both policy and law as expressed by the Board and Circuit Courts regarding the fundamental need for deference to the right of a religious organization to be free of intrusion in the manner in which it engages in its religious mission. Furthermore, at no point in the handling of these three petitions, and despite a number of requests on the Employer's behalf, has the Region ever advised the Employer that there has been a sufficient showing of interest to process the petitions. This is of significance because a meaningful number of employees included in the proposed units have expressed concern that they knew absolutely nothing about the Union's organizing efforts and had never been approached about representation.
2. The constitutional rights of Volunteers of America have been prejudicially affected by the Regional Director's determinations: (a) that the First Amendment is not applicable because Volunteers of America's manifestation of its faith through service to others is not a *sufficient* expression of its religious values; (b) that the social programs through which Volunteers of America realizes its religious mission are not sufficiently *permeated* with a religious purpose; (c) that Volunteers of America does not seek to *indoctrinate* its social service clients and non-observant employees; and

(d) that Volunteers of America's social ser-vice programs are not designed to *propagate* its religious faith.

3. There are compelling reasons for the NLRB to clarify the bright line test promulgated by Circuit Courts in a series of cases on the appropriate standards for asserting jurisdiction over the employees of faith based entities.

REGIONAL DIRECTOR'S DECISION

The Region had before it three petitions filed by the Union requesting recognition as the exclusive representative of certain employees of Volunteers of America, including both case managers and various titles of direct care staff and support personnel, such as client care workers, cooks and maintenance workers. These employees staff four social service programs operated by Volunteers of America at various locations in Westchester County, New York, and the programs are funded individually by various Westchester County government agencies. There has *not* been a finding by the Region that there is a sufficient showing of interest among the employees sought in each individual unit to proceed with the petitions.

In the hearing, Volunteers of America adduced evidence to establish the religious identity of its church, its 100 year old ministry of service to individuals in need, and its fulfillment of its religious purposes by providing social services to those who are at risk. Some, but not all, of that evidence was recited in the Regional Director's finding of facts. The Regional Director confirmed that Volunteers of America is indeed a church, and that its purpose is "to reach and uplift all people and bring them to the knowledge and active service of God." Moreover, the determination found that Volunteers of America's code of "Shared Values" is posted at facilities and includes the value of "spirituality," which holds that the employees of Volunteers of America are "guided by the spiritual foundation and mission of Volunteers of

America and our individual beliefs, thus illustrating God's love in all we do. We invite all people to join in our efforts and to experience the joy of serving others."[1] The Church's "Cardinal Doctrines," which are contained in the constitution of the national Volunteers of America organization, speak to the organization's belief in one supreme God everlasting and omnipotent.

The Regional Director acknowledged in her findings that employees of Volunteers of America are given an opportunity to become ministers in the church, which entails applying for candidacy to the existing ministers, study of certain fundamental texts, and demonstrating an understanding of the material. Employees who fulfill the requirements and are eligible to be confirmed as ministers are elevated to that status at a ceremony of the national organization. It was noted in the determination that the employees who are ministers perform ministerial religious services, and will engage in prayer with staff and clients. Ms. Ashley, a witness for the Employer, testified that staff look to the ministers as spiritual leaders. (Tr. 124). Ms. Hughes, who testified on behalf of the Employer, is an employee and a minister with Volunteers of America; she testified that the ministers would be involved in religious services at sites other than the one where they worked. (Tr. 61-62). The Regional Director acknowledged that at the time of the hearing, seven employees were ministers, that the decision to become a minister is generally a voluntary one, and the ministers do not receive extra compensation. There was testimony that the current Chief Executive Officer of Volunteers of America, Richard Motta, was obligated to become a minister as a requirement of his appointment. (Tr. 72-73).

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[1] The Regional Director noted in her decision that the Union's sole witness claimed to have no familiarity with the "Shared Values." This claim is contradicted by the testimony of the VOA witnesses, who testified in detail about the extensive process which VOA undertook, across the organization on the occasion of the VOA Centennial, to involve staff in the review and revision of the "Shared Values" statement in order more fully to integrate it with the work of staff and services to clients. (Tr. 69-71).

Further, the Bible drive undertaken by Volunteers of America throughout the organization to collect Bibles and make them available to all was acknowledged by the Regional Director.

Despite this documented (and uncontested) record of religious identity, the Regional Director held that Volunteers of America operates in the same manner as any secular social service agency, and that there was no risk of entanglement that could interfere with the exercise of jurisdiction under the Act. Essentially, what the Regional Director decided was that the religious identity of Volunteers of America and the manner in which it acts in furtherance of its religious beliefs and practices is not *sufficiently* religious, or sufficiently Christian, for the Regional Director to extend her seal of religious approval. Because the exercise of its religious mission does not fit a predetermined definition of conventional religious practices demonstrated in conventional ways, the Regional Director determined that Volunteers of America is not religious *enough* to be protected by the First Amendment. The Regional Director arrived at this conclusion despite the fact that she acknowledged the religious identity of Volunteers of America. It strains credulity to assert that an historically-religious employer, with a continuing religious mission of social service, and which enables its employees to become ministers in it and to fulfill a ministerial role in the employment setting, can be deemed to be just another secular service agency.

What clearly emerges from the analysis in the decision below is that the Region has imposed its own government "litmus test" of the sufficiency of faith which wholly ignores the broad protections of the Free Exercise Clause of the First Amendment. The Regional Director has held that those protections are not available to Volunteers of America because it does not seek to *propagate* religious faith, to *proselytize*, or to *indoctrinate* its employees and

clients.[2] Thus, the Regional Director stressed that Volunteers of America does not interrogate employees about their religious beliefs, does not compel employees to be members of its church, and does not subject them to mandatory religious training, thus failing to qualify as "real" religion. The Regional Director further found – as evidence that Volunteers of America is not religious – that its social services are provided to people of all faiths or no faith, to Christians, Muslims, Jews and atheists.[3] Finally, the Regional Director took special note of the fact that Volunteers of America does not conduct its activities in facilities that (in the Regional Director's view) qualify as a traditional church building, thus further militating against the Employer's Constitutional entitlement.

The Regional Director also asserted that the recognition of religious identity under the Act has been reserved for schools and colleges affiliated with religious institutions, which Volunteers of America is not. However, the logical flaws which underlie this assertion are glaring. Religious colleges are generally not places of indoctrination and proselytizing; and almost without exception they neither have a religious membership requirement for faculty and staff, nor do they limit enrollment to members of their specific faith. College classes are not taught in church buildings, and religious training is generally not required of faculty, staff or students. Indeed, tolerance and diversity are the accepted hallmarks of higher education communities, but both the NLRB and the courts have consistently found them to be excluded from jurisdiction under the Act: not because they are intolerant of non-believers or exclusionary, but because that have sufficient indicia of a relationship to a faith-based set of principles. No

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[2] The inherent fallacy of this analysis is that the requirement imposed by the Region would exclude those "major" religions which have existed for thousands of years, but do not propagate, proselytize, or indoctrinate.

[3] Again, this analysis is inherently fallacious, because it suggests the wholly untenable proposition that Volunteers of America should have "proven" its religious legitimacy by withholding its social services from "non-believers."

explanation is offered in the decision below why the same criteria applied to colleges are not applicable to Volunteers of America.

It would be difficult to find a secular social service agency that affords its employees the opportunity to become ministers in its church. It would be a challenge to identify a secular social service agency that collects Bibles for distribution to clients and staff. It would be extraordinary to locate a secular social service agency that has as its public mission "to reach and uplift all people and bring them to the knowledge and active service of God." As one witness testified, at Volunteers of America, the staff are not afraid to speak about faith and God. (Tr. 115).

The Regional Director's analysis is grounded in an assumption that it is appropriate to inquire into the religious *sufficiency* of the beliefs and activities of a faith-based organization in order to determine whether it is religious *enough* to present the issue of First Amendment entanglement. The inquiry undertaken by the Regional Director is in conflict with the carefully reasoned-test, discussed below, that the District of Columbia Circuit Court has articulated, in concurrence with the reasoning of the First Circuit, on the issue of Board jurisdiction over faith-based entities. That bright-line test has *not* endorsed a litany of requirements for religious indoctrination, restriction to members of one's faith, or "conventional" religious practice. To the contrary, the courts have explained that the very intrusive nature of the inquiry necessarily implicates the entanglement prohibited by the Constitution.

This is not to say that a secular entity may cloak itself in religion by a sterile recital unsupported by facts. A threshold inquiry into *bona fides* is required under the test established by the Circuit Court: that an entity *does* hold itself out to promote a faith-based environment, that it *is* a not-for-profit organization and that it *has* a relationship with a religious organ-

ization. In this regard it is significant that the religious exclusion afforded under the Circuit Court test encompasses entities that are affiliated with religious organizations; but there is not a requirement that the entity seeking the exclusion be a "church" – and Volunteers of America *is* a church. Once an entity meets the threshold criteria set by the courts as the qualifying inquiry permitted by the First Amendment, further inquiry is prohibited because of the risk of entanglement.

The Regional Director ignored NLRB cases cited by the Employer (which are discussed below) that have recognized that there is no jurisdiction over the employees of a religious entity who perform essentially secular jobs such as television studio engineers, maintenance workers, and laundry service employees – all of whom perform services of the same nature, and in the same manner, as similar secular operations, and do so at facilities which are not "church" buildings. These cases involved employees who did not perform religious services, were not required to be members of the employer's religious faith, and were not required to provide the services exclusively to individuals of the employer's religious faith. These cases did *not* address jobs involved with the indoctrination of religious beliefs, or the proselytizing of the religion. However, no attempt was made to distinguish these cases from the instant situation. Instead, the Regional Director relied exclusively on a limited number of cases (also discussed below) that do not appear to be based on a similar factual record of religious identity.

By this Request for Review, we submit that Volunteers of America is, as a matter of First Amendment Free Exercise jurisprudence, not subject to the jurisdiction of the Board; that the decision of the Region is prejudicial to the religious rights of the church; and that it is appropriate for the NLRB to review the analysis that should be applied.

ARGUMENT

The Region appeared to be skeptical that a not-for-profit entity which houses the homeless and provides social services to the disenfranchised could possibly be doing so in furtherance of a *bona fide* religious mission. Such skepticism is difficult to understand or accept.

It was readily apparent that the Region was striving to establish both some sort of "checklist" of activities and a "numerical" standard which would empower it to make a determination whether Volunteers of America is "sufficiently religious" to claim the protections of the Free Exercise Clause. To that end, we submit that it is highly instructive to contrast the testimony in the proceeding in the Region to the pertinent testimony which was offered in the Appendix to *Universidad Central de Bayamon v. NLRB*, 793 F.2d 383 (1st Cir. 1986)(en banc) (hereinafter "Bayamon") and in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979) (hereinafter "*Catholic Bishop*"); the First Circuit apparently deemed it pertinent to contrast the examination that took part below in *Bayamon* with the testimony that was elicited when the *Catholic Bishop* case was litigated.

Excerpts from the transcript of testimony in the instant case
by Volunteers of America's witnesses:

A. Testimony of Cynthia Hughes[4]:

"HEARING OFFICER: I have a few questions. How many – do you have knowledge of how many ministers there are in Volunteers of America Greater New York?

THE WITNESS: Yes.

HEARING OFFICER: And that's based on what?

THE WITNESS: Based on our meetings. We meet once a month

HEARING OFFICER: Okay. How many are there?

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[4] Program Director of Regent Family Residence and a minister.

THE WITNESS: Seven. ....

HEARING OFFICER: I'd like a description of what you do in your minister capacity and where you do it.
THE WITNESS: I go to wakes, prayer which is we have a multi-purpose room which is down in the lobby accessible to everybody. So if we have prayer its done there, so whoever wants to come can come. I have staff who have clients who request prayer and they're brought to my office. (Tr. 47-48).

****

HEARING OFFICER: Do you ever – you testified previously regarding ministerial functions that you've performed. Have you ever performed those functions at a location other than the Regent facility or client/employee resident?

THE WITNESS: Yes.

HEARING OFFICER: Where?

THE WITNESS: New Hope.

HEARING OFFICER: What is New Hope?

THE WITNESS: A domestic violence facility.

HEARING OFFICER: Where is that located by Borough?

THE WITNESS: Brooklyn.

HERAING OFFICER: How often have you --

THE WITNESS: Twice.

HERAING OFFICER: In what period of time? You became a minister?

THE WITNESS: In 2006. 2/08.

HEARING OFFICER: And what was the circumstance?

THE WITNESS: Death. (Tr. 61-62.)

(*Cross examination of Cynthia Hughes by counsel for the Union*):

Q: You just testified that there were two prior services at New Hope, is that correct?

A: That I have performed.

Q: Yes.

A: Yes.

Q: Yes. Was that on working time?

A: Yes

Q: The prayer meetings that you testified to earlier about at the Regent, are those conducted on working time?

A: No. (Tr. 62).

B. Testimony of Lynne Plavnick[5]:

(*Cross examination by counsel for the Union*):

Q: Now, Volunteers of America are the overall arching religion, would that be catholicism? What religion? Let me phrase it this way. What religion is Volunteers of America affiliated with?

A: It's a Christian organization.

Q: Is there any particular church that they're affiliated with; Roman Catholic –

Ms. Kehl: I object to the questions.

(*By Union counsel*) -- Greek Orthodox?

HEARING OFFICER: Overruled.

Ms. Kehl: They are a church. I object to the question.

(*By Union counsel*) And I'll ask, is there any particular church that they are affiliated with: Roman Catholic, Greek Orthodox?

A. They're a Christian organization. (Tr. 78-79).

C. Testimony of Kelley Ashley[6]:

(By counsel for the Union):

Q: Grasslands its not a church; is it?

A: It's not a church building.

Q: It's not a church building. What do you mean by that?

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[5] Vice President of Human Resources.

[6] Associate Director of Programming, Grasslands facility.

A: Well I think a church is defined differently for different people. (Tr. 128).

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Q. Is there a synagogue on site?

A. Not on site. There's – 'cause you're, you know, I'm assuming when you say synagogue you're talking about a specific building. And I know this is something that we're gonna probably differ on. But I believe that wherever two or three believers are gathered together that's church. That's the church. Maybe not your definition of a church, but....

Q: Well, we –

A: So if there's two or three Jewish people gathered together and they're praying, that's synagogue.

Q: I'm asking you the question again. Okay. Are Jewish clients allowed to pray?

A: Yes.

Q: Yes or no?
A: Yes. (Tr. 131-132).

Excerpts from the transcript of testimony in the Appendix
***Universidad Central de Bayamon v. NLRB*[7]:**

Testimony of the Archbishop of San Juan, a Cardinal of the Catholic Church:

"Q: Your Eminence if you know, how many liturgies are required at Universidad Central de Bayamon?

A: May I ask what will that prove?

Q: Well we are asking a question of Your Eminence that we hope you can answer. If you can't answer it just tell us you cannot.

A: Well I suppose they have liturgies, but I don't know how many.

Hearing Officer: If I may, Witness. If you know the answer you are instructed to answer. If not please state that you have no personal knowledge of whether there are any or whether they are required."

[Colloquy]

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[7] From the Appendix to the First Circuit opinion.

"Q: Yes, Your Eminence, we would like to know in regards to the liturgies that may be required or may occur at Universidad Central de Bayamon, if you have any personal knowledge or if you have participated in any of them?

A: Well, first of all I don't know exactly the number of liturgies they may have at the University. I don't know exactly the number. Secondly, I don't remember having said Mass at the University itself, since it doesn't have a chapel as such. The Church nearby, which belongs to the parish; there I have said Mass. Now, I would like to add that I have said Mass in other institutions like jails and so forth and that doesn't make them Catholic."

Excerpts in the *Bayamon* Appendix from the transcript of testimony in *NLRB v. Catholic Bishop of Chicago*:

Testimony of Monsignor O'Donnell:

Q: Now, we have had quite a bit of testimony already as to liturgies, and I don't want to beat a dead horse; but let me ask you one question: If you know, how many liturgies are required at Catholic parochial high schools; do you know?

A: I think our first problem with that would be defining liturgies. That word would have many definitions. Do you want to go into that?

Q: I believed you defined it before, is that correct, when you first testified?

A: I am not sure. Let me try briefly to do it again, okay?

Q. Yes.

A: A liturgy can range anywhere from the strictest sense of the word, which is the sacrifice of the Mass in the Roman Catholic terminology. It can go from that all the way down to a very informal group in what we call shared prayer.

Two or three individuals praying together and reflecting their own reactions to a scriptural reading. All of those – and there is a big spectrum in between those two extremes – all of these are popularly referred to as liturgies.

Q: I see.

A: Now possibly in repeating your question you could give me an idea of that spectrum, I could respond more correctly.

Q: Well, let us stick with the formal Masses. If you know, how many Masses are required at Catholic parochial high schools?

A: Some have none, none required. Some would have two or three during the year where what we call Holy Days of Obligation coincide with school days. Some schools on those days prefer to have a Mass within the school day so that the students attend there, rather than their parish churches. Some schools feel that this is not a good idea; they should always be in their parish church; so that varies a great deal from school to school.

****

This Request for Review presents the issue of jurisdiction because, as an inter-denominational Christian church, Volunteers of America is pursuing its religious mission of service via the very operations which the Union seeks to organize. During the two days of hearings and in the Decision of the Regional Director, Volunteers of America's status as a *bona fide* religious entity was unchallenged, and there was consistent testimony that the religious mission of the organization is realized by service to individuals in need.

What is equally clear from the record, as demonstrated by the near-identity of the testimony in this case to the testimony in *Catholic Bishop* and *Bayamon*, is that the inquiry undertaken under the auspices of the Region to weigh the quantitative "sufficiency" of Volunteers of America's religious beliefs and practices is the very entanglement that the Supreme Court warned against as a violation of the First Amendment, and that federal circuit courts have noted in subsequent cases as a constitutional morass. Simply put, we do not challenge the Board's entitlement to make a threshold determination whether a claimed religious identity is a sham: *but once that initial inquiry has been satisfied, any further inquisition may not be permitted.* It is not for the Board to scrutinize whether a religious entity is "religious enough" to be permitted to claim the protections of the First Amendment.

When the inquiry in a Board proceeding focuses on the number of liturgies or prayer services provided at a workplace, a school or a homeless shelter – when the inquiry demands to know whether religious services occur in a stereotypical "church" structure or in

some alternate location – when the exploration tries to test the orthodoxy or presumed stringency of religious practices or adherence – then the inquiry has entered a realm where the Government is judging the "sincerity" of legitimately-held religious beliefs as they relate to how a religious organization manifests its faith. There is nothing in American constitutional law or other jurisprudence which authorizes the Government, or a union, to "license" a religious institution as "legitimate." When a Region of the NLRB determines that an employer fails the "religious" test because it serves people of all faiths, and those without faith – and when it decides that serving Christians, Jews, Muslims and atheists nullifies a religious purpose because it lacks a requirement for indoctrination or conversion – then the Government has crossed the line into licensing "approved" religions.

Such intrusive (and perhaps even offensive) inquiries, take on an even more problematic nature when the religious entity is (perceived by the questioner to be) unconventional, or where its means of religious practice are (thought to be) non-traditional. Given the fact that here, Volunteers of America's ministry is more than a century old, one is constrained to wonder why activity outside a church building or the lack of a fixed liturgy should frame the inquiry.[8] To avoid such intrusions, both the NLRB and the courts have articulated parameters to determine when jurisdiction is permitted.

Unfortunately, the case-by-case analysis followed by the NLRB has evinced an undue reluctance, in a number of cases at least, to incorporate the principles of restraint which have been articulated by the courts, and this has led to some inconsistent and contradictory results in earlier decisions involving similar social service agencies and other Volunteers of America affiliates. Notwithstanding that reluctance, it is difficult to argue that the Act should

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[8] This century of religious history certainly moots any suggestion that VOA has conveniently cloaked itself in expedient pseudo-piety merely to avoid Board jurisdiction.

apply to Volunteers of America, a 100-year-old church whose mission of service to the needy has remained consistent throughout its history. While the pursuit of its faith-based mission does not take place from a church pulpit between 10:00 and 10:45 a.m. on Sundays, Volunteers of America cannot be excommunicated from constitutional protections because its expression of religious commitment is so pervasive as to be "non-traditional."

Volunteers of America relied on its primary organizational documents and three witnesses to make its case: Cynthia Hughes, the Program Director of the Regent Family Residence and a Minister of Volunteers of America; Lynne Plavnick, Vice President of Human Resources for all of Volunteers of America; and Kelly Ashley, Associate Director of Programming at the Grasslands facility.

Volunteers of America is an interdenominational Christian organization: it is a church. Its status as a religious entity was recognized by the Region. Volunteers of America, Inc. (the national "umbrella" organization) is recognized by the United States Internal Revenue Service as exempt from taxes under the tax code section covering public charities, because it is a church. The national organization obtained a group ruling on its exempt status on behalf of itself and affiliated Volunteers of America entities, and the IRS confirmed in a letter dated August 15, 2002 that Volunteers of America Greater New York, Inc. is included in the group ruling issued to the national organization. (Employer's Exh. 1). This church status was acknowledged by the Region in its Decision. Volunteers of America has more than a one-hundred-year old ministry of service; and its staff and leadership both include ministers of the church. (Tr. 31, 42). The Christian mission of Volunteers of America is fulfilled by providing essential social services that meet the needs of an individual's body and soul and that uplift individuals and bring them to the knowledge of God and the active service of God. (Tr. 32).

Among the documents that reflect the religious beliefs of the church is a statement that espouses the essential Christian commitments. The *Cardinal Doctrines*, as these beliefs are codified, are part of the 1896 constitution of Volunteers of America, and apply to employees who become ministers of the church. These ten principles address fundamental concepts of the church's Christian religious faith, and the *Cardinal Doctrines* must be embraced by employees who become ministers. (Employer Exh. 5; Tr. 45).

The purposes of Volunteers of America, which reflect its Christian religious mission, are set forth in detail in the incorporation documents which established the formal legal status of the organization in New York State. (Employer Exh. 2). The initial certificate of incorporation of Volunteers of America Greater New York, Inc. specifically outlines the purposes of the organization in Section 3, where it states that the entity "is formed to conduct activities *which are exclusively charitable and religious*" (emphasis supplied), including:

> (a) To operate a Religious, Missionary and Welfare Society, humanitarian in method and having for its objects and purposes the reaching and uplifting of people, and the extension of aid, both spiritual and material, to all persons who may come within the sphere of its influence;
>
> (b) To establish, contribute to or otherwise maintain and conduct religious service, Bible schools, missions (domestic and foreign), societies, institutions and organizations, all for the purposes and means of carrying out the objects and purposes aforesaid;
>
> (c) To operate and maintain shelters for homeless men and/or women, providing programs of care, habilitation, rehabilitation, homelike environment and social activities for the residents of said shelters, or any combination of such programs;
>
> (d) To plan, construct, erect, build, alter, reconstruct, rehabilitate, own, maintain and operate one or more outpatient facilities to provide treatment services to mentally disabled persons;
>
> (e) To establish, own, operate and maintain community residences for persons afflicted with alcoholism, alcohol abusers and significant others,

> providing programs of care, service, habilitation, rehabilitation, home-like environment and social activities or any combination of such programs;
>
> (f) To establish, own, operate and maintain residential and non-residential programs for runaway and homeless youths for a period not to exceed five (5) years from the date of filing of this Certificate of Incorporation, pursuant to Article 19-H of the New York Executive Law;
>
> (g) To found and operate churches, tabernacles, missions, chapels, Sunday schools and houses of worship by whatever name the same may be designated; and
>
> (h) To help the most needy of the tri-state region to develop self-reliance and personal dignity by providing a diversity of human services programs designed to meet their material and spiritual needs.

(Employer Exh. 2).

Volunteers of America continues to serve individuals and the community in the same manner as set forth in its original corporate charter by ministering to the needs of individuals who are at-risk; by providing shelter for the homeless; by working to rehabilitate those impaired by alcohol and drugs; by providing support for those with mental impairments; and by serving the developmentally disabled. Through these activities, Volunteers of America continues to fulfill the original faith based mission and purposes of the church. (Tr. pp. 33-34).

Beyond its formal and historic corporate documents, Volunteers of America makes its religious purposes known to all – to its clients, to its employees and to the public – through the publicly available mission statement which declares that it exists to uplift people and bring them to the knowledge and service of God. The mission statement explains that it illustrates the presence of God in all that it does to serve people and to create opportunities to experience the joy of serving others. Volunteers of America affirms that it achieves its mission by witnessing positive change in the lives of individuals and communities. The mission

statement is included in its publications, is found on its website and is posted on the walls of its program sites, including its homeless shelters and residences. (Employer Exh. 3).

Volunteers of America's mission is translated into a working set of values for clients and staff through the document entitled *Shared Values*. (Employer Exh. 4). As the hearing testimony demonstrates, the *Shared Values* serves as a core document for the entire community, and employees across the organization worked together to update the *Shared Values* to enhance their relevance to the way that employees fulfill the mission of Volunteers of America and serve Volunteers of America's clients. (Tr. 69-71, 121-122). The *Shared Values* are part of the Employee Handbook, are discussed at staff trainings, are part of the formal employee evaluation system, and provide the foundation for how clients are served. They are posted throughout Volunteers of America's operations, and clients and the public are made aware of these guiding principles. In fact, actions which contravene the *Shared Values* are included as part of the written notice to employees when an employee receives a "corrective action" for unacceptable conduct or performance. (Tr. 40).

The testimony made it clear that its faith-based mission and values form the foundation of Volunteers of America, and are integrated into hiring, evaluation, training, service to clients, and operations. There was consistent testimony from the Employer's witnesses that the faith-based mission is an element in why each of them was attracted to working for Volunteers of America; and they stated that the faith mission of the organization was embraced by many staff and clients. Ms. Hughes testified that during the interview process applicants are asked why they want to work for Volunteers of America and that about 90% of the individuals interviewed responded that they had reviewed Volunteers of America's web site, learned it is a national faith-based organization and wanted to be able to help others and "give back." (Tr. 36).

Similarly, Ms. Ashley explained that she spoke of the faith-based component when interviewing prospective employees, and when evaluating them. (Tr. 117-120). The translation of the faith mission into service to clients, and the dedication to bringing people to an understanding of their personal worth, their inherent dignity and their future potential was explained by both Ms. Hughes and Ms. Ashley. (Tr. 40, 121-122).

The manifestation of the faith-based mission is not demonstrated merely in "traditional" formal prayer experiences – although it was clear from the testimony that prayer takes place both for employees and for clients. Prayer is invoked in holiday celebrations, when there is a death, when someone is facing a personal crisis, and when there is a request for prayer. Prayer takes place on work time and during non-work time, and occurs in offices and in common areas. The manifestation of the religious mission was described by Ms. Kelly Ashley when she spoke of the way that she tried to integrate her practices with the mission statement:

> "...for me this it's my faith. You know, for me, this is the way I actively demonstrate my faith. And that's by the way we treat other people. Reaching them and uplifting them and bringing them to act and service of God. And that's what we try to do. And I think that we can only do that through individual contact with people and how that individual contact that, you know, it needs to be positive, it needs to be uplifting or I can never move you from here to here."

(Tr. 119).

Ms. Cynthia Hughes, a minister of the church and a Program Director, spoke of going to be with a staff person if there is a death in the family to offer comfort and assistance, and of being there for a resident who has experienced a loss. (Tr. 44). She added that the staff at her residence meets to discuss client issues and if they are not sure what to do, they pray. (Tr. 50).

Do Volunteers of America's staff and clients spend their days in constant prayer? Of course not. While the faith-based mission motivates the operation of the client programs, there is also a standard range of social services provided in the programs for clients, including diagnostic review, development of service plans to assist clients to achieve their individual goals, and medical and psychological services and housing referrals. In addition, Volunteers of America does not limit its programs to individuals who are members of its church or religious community: rather, it serves all individuals regardless of religious belief. (Tr. 51). The testimony was clear that clients are not forced to engage in religious practices, and that the church does not seek to proselytize among the clients. (Tr. 51). Instead, Volunteers of America seeks to foster an environment where prayer, spirituality and religious values can enrich its services and interactions, and can make faith a welcoming activity; but consistent with its beliefs, it does not seek to force religious practice or "conversion" on clients or staff who are not open to religious involvement.

Employees do not have to be members of the faith or join the church; and they do not have to undergo religious training. Becoming a minister in the church, while available to employees, is an individual choice. (Tr. 60). What is clear, however, is that employees are aware of the faith-based mission and see it practiced at the various facilities. There was testimony of a very recent agency-wide Bible drive to collect Bibles and to make them available at the programs to staff and clients; the Bible drive included the sites sought to be represented by the Union in this proceeding. (Tr. 116).

The Union's sole witness, a client care worker at Grasslands, testified that she was not aware of religious activities. However, since she worked the midnight to 8 a.m. or 10 a.m. shift at Grasslands, she worked a schedule when clients were expected to be in their rooms

asleep, or just beginning the day with breakfast. In fact, the Union's witness specifically testified that she worked during a period of the day *when there were no activities of any nature planned.* (Tr.153, 172-173).

What emerged directly from the testimony of the Employer's witnesses was that they do not define the faith-based mission of Volunteers of America by "traditional" practices of prayer and religious activity in a building dedicated solely to prayer at scheduled times of the day. Although they did not seek to diminish a traditional approach to liturgical practice, they recognize that a faith-based entity can – and in this case, does -- practice its religious mission by serving the needy and those impaired. As Ms. Ashley testified, " I think we really teach that we're all ministers, that all of us have that job. Some of us more formally. We have the title. But all of us have the ability to do it and are encouraged to do it." (Tr. 124).

The Regional Director's Decision emphasizes that the Valhalla residence, the Crossroads residence and Grasslands serve as homeless housing or transitional residences; that these buildings are not "church" structures; that membership in the religion is not a requirement for clients or staff; and that people of many faiths are part of the workforce and the client population. In effect, her analysis depends on the basis proposition that if Volunteers of America does not fit the formula for a "conventional" religion, with programs offered only *by* members of the religion *to* individuals who were already believers or prospective converts, it could not assert a First Amendment right to be free of Government intrusion.

An exchange during cross-examination effectively illustrates the reasons for the prohibition against intrusive inquiry into the sincerity of religious entities. Questions from the Union's attorney about whether Volunteers of America was affiliated with a church – such as the Roman Catholic Church or the Greek Orthodox Church – underscore an inability or unwil-

lingness to accept that Volunteers of America *is* a church. (Tr. 78-79). Because Volunteers of America defines its religious mission as uplifting persons in need and providing assistance and comfort to them, the Region was unwilling or unable to see those goals as a manifestation of faith. Because Volunteers of America fulfills its religious mission through service in programs that serve a secular population through a (largely) secular workforce, the Regional Director rules that it was. *ipso facto*, not a "church" entitled to an NLRB "license."

The Region appears to argue for a rule which looks only at a label (Roman Catholic, Lutheran, Buddhist), and not at the substance of spiritual manifestation. This is not the analysis permitted by the Constitution.

The First Amendment jurisprudence which divests the NLRB from jurisdiction over religious entities, and religiously-affiliated organizations is generally considered to originate with the Supreme Court's decision in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), where the Court found no expression of an Congressional intent to cover teachers in church-operated schools under the National Labor Relations Act, and thus concluded that there was no Board jurisdiction. It is important to note, however, that *Catholic Bishop* was not the first time the NLRB confronted the issue of jurisdiction over a religious operation. In *Motherhouse of the Sisters of Charity of Cincinnati*, 232 NLRB 318 (1977), for example, the Board determined that numerous operations of the Order of the Sisters of Charity, *specifically including a nursing home*, were conducted in furtherance of the Order's religious objectives, and that it would not further the policies of the Act to assert jurisdiction. *Id.* at 320. The facts of *Motherhouse* demonstrate that the Supreme Court ruling in *Catholic Bishop* was not a departure from conclusions earlier reached by the Board itself. In *Motherhouse*, the Order of the Sisters of Charity, which the Board recognized as a nonprofit religious organization, had leased a building

on its 300-acre property (Mother Margaret Hall), to a private nonprofit hospital for $50,000 per year; and it was the hospital which owned and operated the nursing home. The Order also maintained a laundry facility, a kitchen and a power plant on the property. The hospital operated Mother Margaret Hall as a nursing home, which cared both for a number of the Sisters and for relatives of the Sisters who apparently were not members of the religious Order. The hospital furnished all of the health care personnel who worked in the nursing home, and billed the Order for the care of the Sisters or any of the relatives who could not pay for their own care. The Order provided the hospital (with regard to the nursing home) with laundry service, food service, maintenance services and housekeeping services, and heat – and was compensated by the hospital not only with rent, but with more than $220,00 per year in additional payment for the other services. *Id.* at 318. Across from the Order's property was a small private college, which also paid the order more than $236,000 per year for power and laundry services supplied by the Order. *Ibid.*

Employed by the Order to provide these laundry services, food services, power, maintenance and housekeeping services were 73 lay employees, including 32 kitchen workers, 3 drivers, 19 housekeepers, 3 laundry employees, 6 maintenance men, 1 garage serviceman, 3 groundskeepers, and 6 power plant employees. The International Brotherhood of Teamsters sought to represent those lay workers. *Ibid.* It was not disputed that a significant portion of the employees' time was allocated to services to the nursing home and the college. *Id.* at 318-319 and fn. 5. While the Board did not explicitly base its decision to decline jurisdiction on constitutional grounds, it determined that the activities were not commercial in nature because they were in furtherance of the Order's religious objectives, because many of the nursing home's residents were Sisters. *Id.* at 319. Accordingly, the Board concluded that it would not assert

jurisdiction over the lay employees who provided all of the routine services for the nursing home, and whose services earned the Order significant income.

There were *no* finding in *Motherhouse* that the lay employees were required to be members of, or even adhere to, the Order's religious beliefs or practices. The employees were not engaged in religious activities, and there was no religious component to the laundry or power plant operations. In fact, not all of the nursing home residents were Sisters, or necessarily adherents to the Order's religious beliefs. There was no testimony that *any* religious activities were conducted in the nursing home, or that members of the Order worked in the nursing home. Notwithstanding, the Board held that the exercise of jurisdiction over these employees was not appropriate because their work at the nursing home was *in furtherance of the religious mission* of the Order.

When the Supreme Court decided *Catholic Bishop* in 1979, it declined to construe the NLRA in a manner that would enable the Board to extend jurisdiction to church-operated schools, because the Supreme Court was concerned that the assertion of jurisdiction could involve the Court in trying to resolve difficult and sensitive questions arising out of the First Amendment's Free Exercise Clause. 440 U.S. at 506-07. The Court was wary of the potential entanglements between the State and religion that could emerge in trying to administer a labor relationship, where the Board or a court would be called upon to determine the good faith of a position articulated by the employer with regard to its religious mission. 440 U.S. at 502.

In *Catholic Bishop*, the Supreme Court did not limit its concern to the difficulties which could arise from attempts by a government entity (*i.e.* the Board or a court) to measure the good-faith religious motivations of a religious employer. The Court was equally sensitive to the risks posed *by the very process of inquiry that would be undertaken in order to assess the*

legitimacy of the assertion of the religious mission, recognizing that this intrusive process may itself impinge on the rights guaranteed by the First Amendment. *Id.* at 502. While some initially tried to read *Catholic Bishop* narrowly, as a holding limited to teachers in church-operated K-12 schools where the substantial religious purpose of the education agenda was demonstrable, that restrictive reading did not survive scrutiny.

Shortly after the decision in *Catholic Bishop*, the NLRB was called upon to review an Administrative Law Judge's ruling in *Faith Center – WHCT Channel 18*, 261 NLRB 106 (1982). That case involved the Faith Center Church, a California nonprofit church corporation established to provide a church, public prayer and religious training. Faith Center operated a radio station and three television stations constituting a "church of the air"; and its television station in Hartford, Connecticut was the object of union organizing. Faith Center's Hartford broadcasting facility had its own corporate existence as a television and radio station for the purpose of religious and charitable programming. While the majority of the programming was religious, it also broadcast secular programs (Lawrence Welk and Bozo the Clown), in order to meet the license diversification requirements of the Federal Communications Commission. In addition, the station sold broadcast time to other religious entities. 261 NLRB at 106. The International Brotherhood of Electrical Workers sought to unionize the television broadcast engineers who worked at the station: the job functions of these engineers consisted *only* of the technical duties customary for broadcast engineers in the television industry, and the employees were not required or expected to be members of the Faith Center church. *Id.* at 113-14. In reviewing the facts, the ALJ had noted that the job duties of the broadcast engineers were typical technical positions, and that the broadcast engineers were not members of the church. *Ibid.* The ALJ concluded that if the Faith Church operated merely as a church in the conventional sense,

and was not engaged in the operation of a television station, it would be well-settled that the Board would not assert jurisdiction – but because Faith Center operated radio and television stations *in addition* to a traditional church building as a place of worship, the ALJ concluded that the exemption from Board jurisdiction would not apply. *Id.* at. 113-115. In reversing the ALJ, the Board acknowledged that broadcasting is commonly a commercial enterprise subject to Board jurisdiction, and that the operations of the broadcast station both had an impact on interstate commerce and met the Board's monetary standards. However, the Board also noted that the most salient fact was that the broadcasts through the station *were an electronic extension of the church*, and that the sole distinction between Faith Center and better-known religious denominations was that Faith Center furthered it religious mission by means of electronic media. *Id.* at 107. The NLRB noted that the Board would not assert jurisdiction over churches which operate in a conventional sense using conventional means, and went on to say:

> "There is no persuasive reason for reaching a different result here [Faith Center]. Thus, the difference in the *means* by which Faith Center chooses to advance its religious message furnishes no basis in fact or law for the assertion of jurisdiction. And the assertion of jurisdiction over Faith Center could well raise precisely the serious constitutional questions envisioned by the Supreme Court in its decision in *NLRB v. Catholic Bishop of Chicago*...."

Ibid. (emphasis in original).

In reaching its conclusion in *Faith Center*, the Board recognized that it had to put aside a government evaluation whether Faith Center was a conventional "church" in the commonly accepted sense of that term. *Ibid.* The Board cited, with approval the earlier, and analogous, ruling in *Motherhouse*, which also involved employees who provided services generally considered to be "commercial." *Id.* at. 108. The Board's acknowledgement that jurisdiction is not appropriately exercised as to religious entities that are not conventional "churches" operating

in conventional ways was a significant step in recognizing the controlling vitality of the Free Exercise Clause.

The reach of *Catholic Bishop* was further extended when the United States District Court for the First Circuit decided a case involving a Catholic college in Puerto Rico. Not only did the Circuit Court expand the scope of the First Amendment exclusion to colleges (which are decidedly more secular in staff, student and operations), but the court also emphasized the constitutional concerns arising from the very process of intrusive inquiry.[9] In *Universidad Central de Bayamon v. NLRB*, 793 F.2d 383 (1st Cir. 1986) (en banc), then-judge (later Supreme Court justice) Breyer further developed that proscription after the circuit's *en banc* re-hearing. Although the Circuit acknowledged that less than 10% of the University's faculty were members of the founding religious order, and that the institution was largely secular, there was a religious dimension sufficient to bring it within the ambit of *Catholic Bishop*. To make the point with respect to intrusive inquiry, the Circuit reproduced the testimony of the Archbishop of San Juan and of the Monsignor who had testified in *Catholic Bishop*[10] to demonstrate the nature of the intrusion into the religious practices and activities of the religious which arose when the NLRB tried to set its own ideological litmus test for the religious identity of an employer as measured by the Government's own assumptions about what makes a "real" religion.

The Board was again confronted with the question of jurisdiction over a religious organization when the International Union of Operating Engineers and the Transport Workers Union sought to represent 30 service and maintenance workers at Riverside Church in the City of

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[9] *See* discussion in *Catholic Bishop*, 440 U.S. at 504.

[10] *See* testimony from Appendix A to the *Bayamon* opinion, *ante*.

New York. In *Riverside Church,* 309 NLRB 806 (1992), the Regional Director ruled against the union on the grounds that the service and maintenance employees were analogous to the employees in *Faith Center, supra,* 309 NLRB at 807, and the Board affirmed. The service workers in *Riverside* worked at the church's facility in upper Manhattan, which housed not only the church and its administrative offices, but also (among other activities), a homeless shelter, a food pantry, a cafeteria operated by a separate company, a gift shop, a theater, an assembly hall, a recreation hall, gymnasia, classrooms, locker facilities, a boiler room, storage areas and an underground parking area. 309 NLRB at 806. In addition to conventional church activities, Riverside Church provided various social service functions, such as providing food, clothing and shelter to the needy. The entire facility was open to the public, and the record noted that many individuals parked in the garage, ate in the cafeteria, shopped in the gift shop and attended musical programs – all, presumably, without any requirement that they engage in liturgical rites. In addition, Riverside Church rented offices to a number of nonprofit and for profit entities, including Alcoholics Anonymous, Narcotics Anonymous, and Adult Children of Alcoholics, as well as to a communications company, a chamber music group and a jewelry-making instructor, *Ibid.* The church ran a pre-school in the building, and a program to teach English to foreign students funded by an $800,000 grant from New York State. In 1989, the church had realized in excess of $600,000 annually from rentals of space and garage charges. *Id.* at 807.

In *Riverside,* the staff whom the union sought to represent maintained the entire structure and staffed the garage; the garage attendants worked only in the garage, while others worked through out the facility doing routine cleaning and maintenance. There was no requirement that the staff members profess to any particular religious belief, be part of the church, or receive religious training or indoctrination. *Ibid.* The decision in *Riverside* drew upon the

Board's earlier reasoning in *Faith Center*, noting that in *Faith Center* the Board had declined jurisdiction over employees who had no religious connection to the employer's mission, and who spent all of their working time performing clearly secular tasks, but where it was found that the secular tasks of the broadcast engineers were necessary to effectuate the employer's religious mission. The Board held that the service and maintenance employees at Riverside Church were virtually indistinguishable from the employees at Faith Center's television station, explaining that the secular tasks undertaken but these employees were necessary for the church to accomplish its religious mission. *Id.* at 807.

As the Board and the courts continued to wrestle with the application of the *Catholic Bishop* doctrine, the United States Court of Appeals for the District of Columbia Circuit developed an analysis designed to avoid the constitutional infirmities that had developed in the Board's prior case-by-case approach. In *University of Great Falls v. NLRB*, 278 F. 3d 1335 (D.C. Cir. 2002) the Circuit Court found that it was undisputed that the employer university was affiliated with a recognized religious organization, that it was a nonprofit entity, and that it held itself out to students, faculty and the community as providing a religious educational environment. The application of this bright-line test, which the Circuit Court held to be the appropriate extent of inquiry, avoided an intrusive and offensive inquiry undertaken to determine whether the university has a "sufficiently substantial" religious character to place it outside the NLRB's jurisdiction. There was, accordingly, no need to count icons, count liturgies, or make government determinations as to the "proper" manifestation of religious belief. Building on Judge Breyer's earlier *Bayamon* opinion, the *Great Falls* decision found that intrusion into religious views is not only unnecessary, but offensive, 278 F.3d at 1341 (quoting *Mitchell v. Helms*, 530 US 793, 828), and amounted to an inquiry by the NLRB to determine whether "is it

sufficiently religious?" *Id.* at 1343 (emphasis in the original). The Circuit Court instead articulated a less-intrusive standard which requires a determination whether the entity holds itself out to the public as providing a religious environment, and is thus a *bona fide* religious institution *even if* its principal focus is on secular activities. *Id.* at 1344. Recognizing that some religiously-sponsored institutions are essentially secular in operation and may not require attendance at religious services or require the recipients of its services to adhere to a particular faith, the Circuit Court stated that a rigid approach is not called for. *Id.* at 1347. The Court reasoned that the bright-line test which it had devised would prevent wholly secular institutions from invoking the religious exemption merely to avoid Board jurisdiction. *Id.* at 1344. A legitimate, public religious identity, together with the nonprofit status and the religious affiliation would be a sufficient basis to bar NLRB jurisdiction. *Ibid.*

In 2009, the District of Columbia Circuit Court had occasion to revisit *Great Falls* in *Carroll College v. NLRB*, 558 F.3d 568 (D.C. Cir. 2009). Carroll College, affiliated with the United Presbyterian Church, sought review of the NLRB's bargaining order on the basis of a lack of jurisdiction pursuant to *Catholic Bishop* and *Great Falls*. Again, the Circuit Court held that the College was beyond the NLRB's jurisdiction. In analyzing the determinations below by the Regional Director and the Board, the Circuit Court noted that Carroll College's challenge was based on an argument that requiring it to bargain with the union would substantially burden its Free Exercise rights. The Regional Director had dismissed that argument because the college could not show that it was "church operated" – but in reversing the Board, the Circuit Court found that this inquiry had been precisely what *Catholic Bishop* prohibited because it is tantamount to Government questioning about how effective an institution is at inculcating its beliefs.

A recent and especially relevant reaffirmation of the Board's own reasoning in *Motherhouse, Faith Center* and *Riverside* appears in *St. Edmund's Roman Catholic Church*, 337 NLRB 1260 (2002), There, the union had sought to represent custodial employees who worked at a church complex, which housed many operations including school buildings, a convent, a rectory and the church. The Regional Director, in asserting jurisdiction, relied upon a conclusion that the custodial nature of the employees' work did not further the employer's religious mission even though they were employed directly by the church. In arriving at this determination the Regional Director had relied, in pertinent part, upon two older cases, *Hanna Boys Center*, 284 NLRB 1080 (1987), *enforced* 940 F.2d 1295 (9th Cir. 1991), which involved a separate entity which was a group home for boys, and *Ecclesiastical Maintenance Services*, 325 NLRB 629 (1998), which involved a separate corporation that provided cleaning and maintenance services for church properties. The Board in *St. Edmund's* explained that these cases were not applicable in St. Edmund's because neither had involved a religious entity as the employer.

In reversing the Region's determination in *St. Edmund's*, the Board focused on the question of whether the Region's view of *Catholic Bishop* had been too narrow, and concluded that the assertion of jurisdiction over religious institutions was unwarranted, regardless of the organizing employee's function *vis-à-vis* the employer's religious mission. The Board ruled that it generally will not assert jurisdiction over nonprofit, religious organizations, citing *Motherhouse of the Sisters of Charity, supra*, and *Board of Jewish Education of Greater Washington, D.C.*, 210 NLRB 1037 (1974). The Board further stated, in reliance on *Faith Center* and *Riverside Church, supra*, that this principle of restraint applies to purely secular employees who perform secular services for a religious institution if, without them, the employer cannot not accomplish its religious missions. *Id.* at 1260. Accordingly, in *St. Edmund's*, the Board noted

that there was a close integration between the Church and the activities provided, that the schools were an integral part of the Church's mission, and that the Church was the single and direct employer of the employees sought to be unionized; and it concluded that based on those facts jurisdiction was inappropriate. *Id.* at 1260-1261.

Catholic Bishop and the cases which followed have produced certain guiding concepts regarding NLRB jurisdiction over religious employers. The NLRB lacks jurisdiction where there is a nonprofit religious organization, or a religiously affiliated organization, which holds itself out to the public as providing a religious environment in its operations. While it was at one time suggested that the doctrine applied only to religious schools below the college level because of their primary mission, that restriction has not held up, and it is recognized that the rulings apply equally to colleges, universities and other settings such as television stations, nursing homes and garage facilities. The focus is whether the activity in question furthers an organization's religious mission, which differentiates its operations from primarily commercial activities which are unrelated to the faith-based purpose of an employer. The Regional Director sought to limit the reach of these cases as applicable only to schools and colleges despite the broader rulings and applicability of the underlying analysis baring jurisdiction. What the Regional Director chose to ignore is that the activity in question *is* Volunteers of America's religious mission.

It has become clear that the *Catholic Bishop* doctrine does not require that the employees in question be members of the employer's religious group, that they be adherents to the employer's religious creeds, that they be subject to proselytizing to join the religion, that they must participate in religious activities, or that they must engage in providing "religious" services. Thus, the *Catholic Bishop* standard has barred jurisdiction over television broadcast engineers,

garage attendants and operators of laundry services, garages, and power plants. While the bar applies where a church employer is involved, it also extends (in the college cases, for example) to a situation where the employer is a separately-chartered institution. Significantly, while the exemption is available to "traditional" religious entities which operate in a "conventional" manner, the fact that a religious organization may be non-traditional or pursue non-conventional means for furthering its religious mission, does not defeat a *Catholic Bishop* analysis. Thus, where a nonprofit *bona fide* religious organization holds itself out to the public as fostering a religious environment or community, even if it does so in a non-conventional manner, hires secular employees, and serves secular clients or participants, the Board should refrain from exercising jurisdiction unless the employer is engaged in purely commercial activity.

It is simply not the place of the NLRB to engage in invasive inquiry whether the manner in which a religious organization realizes its religious mission satisfies some Government litmus test of religious sincerity or substantial activity. A Government inquiry whether an employer is "religious enough" is violative of the First Amendment; but a more precise, limited, and less-subjective inquiry into religious *bona fides* is not. Although the Government has a legitimate interest in regulating labor relations, that interest does not outweigh Constitutional prohibitions against religious entanglement.

The Regional Director pointed to a group of cases that arose primarily in the early 1980's, involving The Salvation Army and Volunteers of America divisions in other parts of the

country in order to assert that the *Catholic Bishop* bar is not applicable in this case.[11] None of those early decisions, however, address in any detail whether those local entities had made a record of the interrelationship between the faith-based mission and the programs offered, as the Regional Director clearly conceded has been documented in the proceedings in this case. In fact, the absence of analysis of the religious mission in the earlier cases suggests that, because Volunteers of America, and to a similar extent The Salvation Army, are not churches in the conventional manner, and do not realize their religious missions through conventional means, the Board and the courts were not at that time prepared to view them through the same lens as would then have been applied to a Catholic or Jewish parochial school. It may be that the expansive mission of service practiced by Volunteers of America Greater New York simply was not accorded the same credibility as traditional faith-based activity in those early years. In light of subsequent jurisprudence, however, it is clear that the mission of service practiced by Volunteers of America Greater New York is entitled to the same credibility as other faith-based activity; and a dismissive conclusion to the contrary has profound First Amendment implications.

In addition to the threshold problems raised by the dismissive treatment of the unconventional religious natures of Volunteers of America and The Salvation Army, those older

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[11] *See The Salvation Army Williams Memorial Residence*, 293 NLRB 944, *enforced without opinion*, 923 F.2d 846 (2d Cir. 1990) (operation of a residence facility for adults was essentially secular because religious activities were voluntary, church membership was not required and employees were not expected to proselytize); *NLRB v. The Salvation Army of Massachusetts Dorchester Day Care Center*, 763 F.2d 1 (1st Cir. 1985) (day care center did not require that children or staff be members of the religious entity and center provided no religious instruction); *Denver Post of the National Society of The Volunteers of America v. NLRB*, 732 F.2d 769 (10th Cir. 1984) (social services for battered women and runaway youth were secular because staff members were not required to have a particular religious background or training and no religious activities were conducted at the program); *Volunteers of America-Minnesota-Bar None Boys Ranch* v. NLRB, 752 F.2d 345 (8th Cir. 1985) (youth facility was a secular operation because primary purpose was care of children and not the propagation of sectarian doctrines; lay staff were selected without regard to religious beliefs or affiliation; staff did not attempt to persuade children to accept sectarian doctrines; and religious services were conducted by ministers of various denominations);and *Volunteers of America, Los Angeles v. NLRB*, 777 F.2d 1386 (9th Cir. 1985) (detoxification programs where staff were not asked about religious affiliations when they applied, employees received no religious training or indoctrination and employees did not solicit support for the church from clients).

cases are distinguishable on additional grounds. In those cases, the analysis reflected the restrictive interpretation which the Board initially accorded to *Catholic Bishop*: that it applied only to church-run schools engaged in the propagation of doctrine, which required that employees be chosen with regard to religious belief, and whose religious activities had the goal of soliciting members or proselytizing about the religion. It is clear that this analysis is no longer valid, since it would be impossible to assert that a college which is exempt from NLRB jurisdiction under *Catholic Bishop* must restrict its faculty to members of the religious group, that it must restrict its student body to members of the religious group, or that its programs of study must be designed to proselytize for its religious beliefs. In fact, the Board has in numerous subsequent decisions (discussed above), declined jurisdiction over employees who were *not* members of the religious group, and who performed secular services such as operating a power plant, a laundry, a garage or a television station. Thus, it is erroneous to assert that the analysis applied in the 1980's could withstand scrutiny under the current status of the law on these issues.

Indeed, one of the cases, *Salvation Army Dorchester Day Care*, 763 F.2d 1 (1st Cir. 1985), demonstrates the very entanglement that is now recognized to constitute a First Amendment infringement. There, the dispute arose from the union's refusal to consider a proposed "management rights" clause stating that the parties "recognize that the operation of the [Day Care] Center is an integral part of the mission of the [Salvation] Army, and that neither the Union nor any employee shall engage in any activity which interferes with, or contests the mission of the Army." 763 F.2d at 2. It is hardly surprising that the Salvation Army would want an understanding that the mission of the organization would be respected – but the Board (and ultimately the court), applying NLRB concepts about mandatory subjects of bargaining, held that the Salvation Army could not insist on bargaining over the issue of its ecclesiastical mission

clause, because it did not, according to the Board, involve terms and conditions of employment. While a traditional management rights clause is a mandatory subject of bargaining, the "mission" language the Salvation Army sought was found not to be a mandatory subject of bargaining because it did not bear a direct relationship to the terms and conditions of employment. Clearly, however, the religious leadership of the Salvation Army viewed commitment to the mission as a significant condition of employment, even as the *Shared Values* at Volunteers of America are an integral document for employees of VOA. The holding in *Salvation Army Dorchester Day Care* is a perfect example of the entanglement that would follow an assertion of jurisdiction, and the burdens the application of the NLRA can place on a faith-based organization.

The facts of this case parallel *St Edmund's*. Volunteers of America is a church. It is the single and direct employer of the employees sought to be unionized. The employees provide social service programs as the very embodiment of the religious mission of the organization. As the Board explained in *Faith Center*, even where a religious organization does not pursue its religious purposes in a conventional manner or by conventional means, that is not a basis for ignoring *Catholic Bishop*. Moreover, an inquiry that intrudes on the "sufficiency" or "traditional nature" of the religious mission motivating Volunteers of America is the very inquiry which violates the First Amendment; and the manner in which Volunteers of America realizes its religious mission is protected from inquiry as a matter of free exercise. Jurisdiction is *not* conferred simply because an employer employs secular staff to provide the services which embody its religious mission, because without that staff, it could not fulfill its faith-based purposes. Here, it is simply not possible to separate the social service programs from the faith based mission of the church, and an assertion of jurisdiction would contravene a consistent line of Board and judicial decisions.

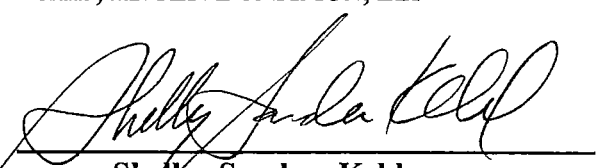
CONCLUSION

For all of the reasons hereinabove set forth, the decision of the Regional Director should be reviewed and reversed.

Dated: New York, New York
July 29, 2010

Respectfully submitted,

KEHL, KATZIVE & SIMON, LLP

By: 

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